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FEDERAL PRACTICE AND PROCEDURE

OVERVIEW

The Tenth Circuit has announced several decisions of note in the area of federal practice and procedure which either expand the scope of procedural issues, chart new courses in the field, or crystallize previously settled doctrines. Although none of the Tenth Circuit's decisions presents radical departures or adamant affirmations of settled doctrines, the practicing attorney should apprise himself of the subtle changes which have occurred during this survey period. The topics which this survey addresses include: attorney's fees, in personam jurisdiction, pretrial motions, notice under the Fair Labor Standards Act, trial and posttrial motions, the final judgment rule, and cross-appeals.

I. ATTORNEY'S FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT

Under the prevailing "American Rule" of attorney's fees, a successful litigant may not collect attorneys' fees from the losing party.[1] In *United States v. 2,116 Boxes of Boned Beef*,[2] the Tenth Circuit faced the difficult task of interpreting the Equal Access to Justice Act (EAJA).[3] This was Congress' attempt to legislate an exception to the American Rule in situations where the United States government assumes the position of losing party.

In *Boned Beef*, the United States Department of Agriculture (USDA) seized 273 beef carcasses and offal belonging to Jarboe-Lakey Feedlots, Inc. The USDA charged the carcasses contained diethystilbestrol (DES), a prohibited chemical shown to leave potentially carcinogenic residue in meat when used in feed and implants.[4] The United States later filed a seizure action against the meat alleging violations of the Federal Meat Inspection Act.[5]

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1. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 245 (1975). In the United States, a successful litigant may not ordinarily collect attorney's fees from the loser. The rule in England, and in other parts of the world, is that attorney's fees may be awarded to the prevailing party. *Aleyska*, 421 U.S. at 247 & n.18; Spencer v. NLRB, 712 F.2d 539, 543 & n.12 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1908 (1984). The rule has only two narrow exceptions:

> when a "loser has acted in bad faith, vexatiously, wantonly, or for oppressive reasons," he may be obliged to reimburse the winner for his attorneys' fees, and, when an individual litigant, by successfully maintaining a suit, has conferred a benefit on a group of persons the court may allow him to recover his attorneys' fees from the beneficiaries. [citations omitted]

712 F.2d at 543. *See generally* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 194-200 (1973).

2. 726 F.2d 1481 (10th Cir.), *cert. denied*, 105 S. Ct. 105 (1984).

3. 28 U.S.C. § 2412 (1982).

4. *Boned Beef*, 726 F.2d at 1484.

5. 21 U.S.C. §§ 601-695 (1982). Specifically, the United States charged the meat had been adulterated within the meaning of § 601(m). This statute provides, in pertinent part, that meat is adulterated:

After trial, the district judge dismissed the action finding that although the United States demonstrated the feedlot owner implanted the animals with DES and that DES was harmful within the meaning of the Meat Inspection Act, the government failed to prove the *amount* of DES found in the meat was harmful.[6] The court declined to consider Jarboe-Lackey's attorney's fees request under the EAJA and both parties appealed.[7] The Tenth Circuit dismissed both appeals for finality. The trial court, on remand, considered and denied the defendants petition for attorney's fees under the EAJA.[8]

Judge Arraj,[9] writing for the Tenth Circuit, quickly disposed of an initial jurisdictional argument[10] and proceeded to discuss the EAJA. The court noted that Congress designed the EAJA to "relieve victims of abusive governmental conduct and to expose more governmental action to adversarial testing by encouraging private parties to challenge U.S. behavior."[11] The stated purpose of the EAJA is to encourage members of the private sector to bring suit to seek review of, or defend against, unreasonable governmental action.[12] The EAJA allows attorney's fees to be awarded to a prevailing party in two instances. First, attorney's fees may be collected from the United States to the extent any other party would be liable under statute or common law.[13] Second, courts *must* award attorney's fees unless they find "the position of the United States substantially justified or special circumstances make an award unjust."[14] Jarboe-Lackey appealed, citing both provisions.[15]

The court first considered section 2412(d)(1)(A),[16] the second situ-

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"(1) If it bears or contains any poisionous or deleterious substance which may render it injurious to health. . .
(2)(A) if it bears or contains . . . any added poisionous or deleterious substance which may . . . make such article unfit for human food . . . ."

6. *Boned Beef*, 726 F.2d at 1484.

7. *Id.*

8. *Id.*

9. United States District Judge for the District of Colorado, sitting by designation.

10. Jarboe-Lackey asserted that because the Meat Inspection Act limited the government's right to detain seized meat for not more than twenty days, 21 U.S.C. § 672 (1982), it followed that the complaint in any libel action must also be filed within twenty days, and the government's failure to do so was a jurisdictional defect. The court rejected this argument, finding the express language of the act allowed a judicial proceeding to be instituted "at any time against an adulterated meat food product." *Boned Beef*, 726 F.2d at 1485 (quoting United States v. 2623 Pounds, More or Less, of Veal & Beef, 336 F. Supp. 140, 144 (N.D. Cal. 1971)).

11. 726 F.2d at 1485 (citing Spencer v. NLRB, 712 F.2d 539, 550 (D.C. Cir. 1983)).

12. H.R. REP. No. 1418, 96th Cong., 2d Sess. 5-6 (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984.

13. 28 U.S.C. § 2412(b) (1982). This provision codifies the "bad faith" and "common benefit" exceptions to the American Rule, making them applicable to the government. Spencer v. NLRB, 712 F.2d 539, 545 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1908 (1984). *See supra* note 1.

14. 28 U.S.C. § 2412(d)(1)(A) (1982). This is an experimental provision of the act which will be automatically repealed by its "sunset provision" if not reenacted before October 1, 1984. Pub. L. No. 96-481, § 204(c), 94 Stat. 2321, 2329 (1980) (codified at 28 U.S.C. § 2412 (1982).

15. *Boned Beef*, 726 F.2d at 1485.

16. 28 U.S.C. 2412(d)(1)(A) (1982).

ation described above. This simple provision, that courts shall award attorney's fees "unless the position of the United States is substantially justified," has thrown the circuits into bitter disagreement over its meaning.[17] Noting that other courts seemed in general agreement that the meaning of "substantially justified" was essentially one of reasonableness,[18] the Tenth Circuit outlined the controversy:

> While there is little debate about the meaning of "substantial justification," there is considerable disagreement about *which* government position must be justified. Some courts have concluded that the government position referred to in section 2412(d)(1)(A) is the litigation position. Other courts have held that it refers to the agency action which made it necessary for a party to file suit.[19]

The "litigation position" means arguments presented to the court at trial, as opposed to government action precipitating the lawsuit.[20] The court reasoned that it did not make any difference which construction of the clause was chosen as the litigation position of the United States will almost always be that its underlying action was legally justified.[21]

Without further discussion, the court adopted the interpretation of the District of Columbia Court of Appeals in *Spencer v. NLRB*.[22] In *Spencer*, the District of Columbia Circuit, after considering the identical issue presented in *Boned Beef*, concluded that although legislative history supported both interpretations, the underlying purpose of the act would be most effectively served by adopting the "litigation position" interpretation.[23] Applying this new rule to the facts, the court in *Boned Beef* found no error in the district court's holding that the posture assumed by the government at trial had been substantially justified.[24]

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17. *Compare* Rawlings v. Heckler, 725 F.2d 1192 (9th Cir. 1984) ("underlying action" interpretation); Natural Resources Defense Council v. EPA, 703 F.2d 700 (3d Cir. 1983); Boudin v. Thomas, 554 F. Supp. 703, 705-06 & n.7 (S.D.N.Y. 1982); Environmental Defense Fund, Inc. v. Watt, 554 F. Supp. 36, 40-41 (E.D.N.Y. 1982) *aff'd* 722 F.2d 1081 (2d Cir. 1983); MacDonald v. Schweiker, 553 F. Supp. 536, 540-41 (E.D.N.Y. 1982); Cornella v. Schweiker, 553 F. Supp. 240, 242 & n.3 (D.S.D. 1982) *rev'd on other grounds*, 728 F.2d 978 (8th Cir. 1984) (dicta); Moholland v. Schweiker, 546 F. Supp. 383, 386 (D.N.H. 1982); Citizens Coalition for Block Grant Compliance v. City of Euclid, 537 F. Supp. 422, 426 (N.D. Ohio 1982) *aff'd* 717 F.2d 964 (6th Cir. 1983); *with* Kay Mfg. Co. v. United States, 669 F.2d 1376, 1379 (Fed. Cir. 1983) (litigation position); Gava v. United States, 699 F.2d 1367, 1370 (Fed. Cir. 1983); Tyler Business Servs. v. NLRB, 695 F.2d 73, 75 (4th Cir. 1982); Broad Avenue Laundry & Tailoring v. United States, 693 F.2d 1387, 1390 (Fed. Cir. 1982); Grand Boulevard Improvement Ass'n v. City of Chicago, 553 F. Supp. 1154, 1162-63 (N.D. Ill. 1982); Alspach v. District Director of Internal Revenue, 527 F. Supp. 225, 228 (D. Md. 1981).

18. *Boned Beef*, 726 F.2d at 1486-87.

19. *Id.* at 1487 (citations omitted). "These two interpretations have come to be known, respectively, as the 'underlying action' and the 'litigation position' theories." Spencer v. NLRB, 712 F.2d 539, 546 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1908 (1984).

20. *Spencer*, 712 F.2d at 546.

21. *Boned Beef*, 726 F.2d at 1487 (Citing Foley Constr. Co. v. United States Army Corps of Engineers, 716 F.2d 1202, 1204 (8th Cir. 1983)).

22. 712 F.2d 539 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1908 (1984).

23. *Id.* at 556. For a differing view, see Natural Resources Defense Council v. EPA, 703 F.2d 700 (3d Cir. 1983).

24. *Boned Beef*, 726 F.2d at 1487-88.

The court next turned to section 2142(b), a provision which would allow recovery of attorney's fees where a party shows the government has acted in bad faith in filing or prosecuting the case.[25] Noting the section is punitive in nature and would only be imposed in exceptional cases for dominating reasons of justice, the court held the district judge did not abuse his discretion in finding the provision inapplicable.[26] After considering additional arguments unrelated to this discussion of the EAJA,[27] the court affirmed the trial court's decision.

Spencer's interpretation of the EAJA, adopted by the court in *Boned Beef*, cannot be faulted because it is a persuasive and well-reasoned opinion. It should be noted though, that the court in *Boned Beef* might have followed equally persuasive opinions of other courts, such as the Third Circuit in *National Resources Defense Council v. United States Environmental Protection Agency*.[28] In that case, the Third Circuit interpreted the "substantial justification" provision much differently: "Thus plainly, 'position of the United States' means position taken by 'any agency and any official of the United States acting in his or her official capacity.' Only hostility to the underlying legislative purpose, we suggest, would permit [such] a reading . . . ."[29] In speaking of the competing interpretation enunciated in cases such as *Spencer*, the Court stated that the interpretation adopted by these courts:

> means that no matter how outrageously improper the agency action has been, and no matter how intransigently a wrong position has been maintained prior to the litigation, and no matter how often the same agency repeats the offending conduct, the statute [EAJA] has no application, so long as employees of the Justice Department act reasonably when they appear before the court.[30]

In *Boned Beef* the Tenth Circuit adopted one of two interpretations of the EAJA, both of which have basis in the only interpretational tool the courts had at their disposal—legislative history.[31] Since the *Boned*

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25. *Id.* *See supra* note 12.

26. 726 F.2d at 1488.

27. Jarboe-Lackey argued the District Court was required to allow an evidentiary hearing on the issues of substantial justification and bad faith. The court held that although an evidentiary hearing would have been permissible, the parties had ample opportunity to brief and argue the EAJA issue and were consequently not prejudiced by the denial. *Id.* at 1489.

Next, Jarboe-Lackey contested the finding of the court that the steers had been illegally implanted. The court held the finding was supported by evidence and would not be overturned. *Id.* at 1489-90. Finally, Jarboe-Lackey argued that the trial court erred in denying their motion and counterclaim for recoupment. The court held that since the government had not sought money damages, it would be impossible to reduce or discharge the claim by recoupment or setoff. *Id.* at 1490. As to the counterclaim, the court held because the government had not consented to the claim, it was properly barred under the doctrine of sovereign immunity. However, Jarboe-Lackey might validly assert a claim against the government under the Tucker Act (28 U.S.C. § 1491 and 28 U.S.C. § 1346(a)(2) (1982)). *Id.* at 1491.

28. 703 F.2d 700 (3d Cir. 1983).

29. *Id.* at 707.

30. *Id.* at 706-07.

31. H.R. REP. No. 1418, 96th Cong., 2d Sess. 5-6 (1980), *reprinted in* 1980 U.S. CODE

Beef decision, attorney's fees may be recovered under the EAJA only where it is shown that the government, as the losing party, acted in bad faith in filing or prosecuting the action, or when the government's position adopted at trial is not substantially justified.

II. IN PERSONAM JURISDICTION

Manley v. Fong[32] required the Tenth Circuit to determine the reach of Oklahoma's long arm statute.[33] Specifically, the court had to determine whether a contract to purchase a fractional share of an oil and gas lease, located in Oklahoma, conferred upon the Oklahoma court in personam jurisdiction over an out-of-state defendant.[34]

The plaintiff, an Oklahoma resident, entered an agreement with the defendant, a Vancouver resident, whereby the plaintiff was to sell a seven/twenty-fourths interest in his oil and gas lease in exchange for the defendant's deposit of ten percent of the purchase price in trust with a designated attorney and the payment of the balance on a specified date. Upon defendant's failure to pay the balance due, the plaintiff filed the subject breach of contract action in Oklahoma. The defendant's motion to dismiss, initially denied, was granted upon the defendant's motion to reconsider. The trial court then entered an order dismissing the complaint for lack of in personam jurisdiction. Subsequently, the Tenth Circuit reversed the order of dismissal.[35]

Under the Oklahoma long arm statute,[36] the court may exercise personal jurisdiction over a person having an interest in, using, or possessing real property within the state. Two questions then arise: (1) whether an oil and gas lease is an interest in real property, and (2) whether the execution of a contract to purchase an interest in real estate vests equitable title in the purchaser.

In response to the first question, the Tenth Circuit relied upon its earlier decision in *Jones v. Tower Production Co.*,[37] where it held that "an oil and gas lease is an interest in real property."[38] Answering the second question proved to be less straightforward because the court was presented with conflicting authority.[39] The Tenth Circuit ultimately adopted the holding of the Supreme Court of Oklahoma in *Alfrey v. Rich-*

CONG. & AD. NEWS 4984. *See generally* Note, *The Award of Attorney's Fees Under the Equal Access to Justice Act*, 11 HOFSTRA L. REV. 307 (1982).

32. 734 F.2d 1415 (10th Cir. 1984).

33. OKLA. STAT. ANN. tit. 12, § 1701.03(a) (West 1980). The pertinent section states: "A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action or claim for relief arising from the person's: . . . (5) having an interest in, using, or possessing real property in this state." *Id.*

34. *Manley*, 734 F.2d at 1417.

35. *Id.* at 1417-18.

36. OKLA. STAT. ANN. tit. 12, § 1701.03(a)(5) (West 1980). *See supra* note 33 and accompanying text.

37. 120 F.2d 779 (10th Cir. 1941).

38. *Id.* at 782.

39. The following cases support the proposition that a contract to convey land, in the future, and contingent upon performance of certain acts, does not create equitable title in the vendee: Sutton v. Commissioner of Internal Revenue, 95 F.2d 845, 849 (10th Cir.

ardson[40] which elucidated the contours of the doctrine of equitable conversion.[41] Essentially, the doctrine states that execution of a contract for the sale of land, for valuable consideration, vests equitable title in the vendee from the time of execution of the contract.[42]

Finally, the Tenth Circuit addressed the considerations set forth in the United States Supreme Court decisions of *Hanson v. Denckla*[43] and *International Shoe Co. v. Washington*.[44] The pertinent section of *Hanson v. Denckla* revolves around whether an individual has availed himself of the privilege of conducting activities within the forum state such that the benefits and protections of its laws were invoked.[45] *International Shoe* addressed the question of whether the "traditional notions of fair play and substantial justice" would be offended by exercising in personam jurisdiction.[46] Relying upon these considerations, the Tenth Circuit found that the exercise of in personam jurisdiction over an international defendant who entered a contract to purchase an interest in an oil and gas lease did indeed comport with the due process principles announced in these Supreme Court cases. Thus, a plaintiff may obtain in personam jurisdiction over a resident of a foreign country based upon an applicable long-arm statute and presumably Rule 4(i)[47] which provides for service of process in a foreign country.

III. PRETRIAL MOTIONS

A. *John Doe Pleading and the Statute of Limitations*

The practice of identifying an unknown or protected party in the pleadings with a fictitious name, commonly termed "John Doe" pleadings,[48] raises procedural problems when a statute of limitations issue arises. The question presented in *Watson v. Unipress, Inc.*[49] was whether, upon discovery of a party's true identity, insertion of the party's name in the pleadings after the running of the statute of limitations will relate back or whether it is technically the addition of a new party.

1938); Blakely v. McCrory, 274 P.2d 1013, 1015 (Okla. 1954); Parks v. Classen Co., 156 Okla. 43, 9 P.2d 432, 433-34 (1932).

The following cases support the proposition that this type of contract creates equitable title in the vendee: Alfrey v. Richardson, 204 Okla. 473, 231 P.2d 363, 368 (1951); Whale v. Pearson, 201 Okla. 619, 208 P.2d 552, 556 (1949); Scott-Baldwin Co. v. McAdams, 43 Okla. 161, 141 P. 770, 771 (1914); Adams v. White, 40 Okla. 535, 139 P. 514, 515 (1914).

40. 204 Okla. 473, 231 P.2d 363 (1951). This is the case the trial court originally relied upon in denying the defendant's motion to dismiss.

41. *Id.* at 368.

42. *Id.*

43. 357 U.S. 235 (1958).

44. 326 U.S. 310 (1945).

45. *Henson*, 357 U.S. at 253.

46. *International Shoe*, 326 U.S. at 316.

47. The court did not discuss the manner in which service of process was effected. Rule 4(i) provides for such service and takes into consideration the procedures of the law of the foreign country.

48. Presently, no federal statute or rule specifically authorizes this practice. Watson v. Unipress, Inc., 733 F.2d 1386, 1388 (10th Cir. 1984).

49. *Watson*, 733 F.2d 1386 (10th Cir. 1984).

In *Watson*, plaintiff filed a products liability action two days before the applicable statute of limitations expired. The complaint named "John Doe" as one of the defendants.[50] Five months later, plaintiff learned the identity of John Doe and sought to amend the complaint to name the new defendant, Unipress, Inc., in the caption.[51] Unipress filed a motion to dismiss and for summary judgment, arguing the statute of limitations barred its inclusion in the case.[52] Agreeing the addition of Unipress was outside the statute of limitations, the trial court granted the motion.[53]

On appeal, Watson asserted two arguments. First, Watson argued that under Colorado law the place of injury determines whether John Doe pleading tolls the statute of limitations.[54] Watson cited Colorado Rule of Civil Procedure 10(a)[55] as authority for the proposition that John Doe pleading allows substitution of the real party, after the statute has run, if the original claim is timely filed.[56] The Tenth Circuit rejected this argument. The court stated neither the rule itself nor the recent Colorado case of *Marriot v. Goldstein*[57] could be read as allowing substitution of Unipress.[58] The court decided it did not need to determine whether Colorado or federal law controlled on the tolling issue since plaintiff's cause of action against defendant would fail in either situation.[59]

Second, Watson contended that her amended complaint naming Unipress as defendant, filed after the statute had run, should relate back to the date of original filing under Federal Rule 15(c).[60] In considering this argument, the court stressed the difference between addition of a

50. *Id.* at 1387. The Colorado Rules of Civil Procedure allow John Doe pleading. *See* COLO. R. CIV. P. 10(a).

51. *Watson*, 733 F.2d at 1387. At the time of injury the company was named Unipress, Inc. As the result of a merger, the company's name became BMM Weston, Inc. Throughout the opinion, the court refers to Unipress, Inc. as "BMM".

52. *Id.*

53. *Id.*

54. *Id.*

55. COLO. R. CIV. P. 10(a). The rule states in pertinent part: "In the complaint the title of the action shall include the names of all parties."

56. *Watson*, 733 F.2d at 1388.

57. 662 P.2d 496 (Colo. App. 1983). The court in *Marriot* held that a party replacing a "John Doe" caption with the true party amounted to "changing a party" within the meaning of Colorado Rule 15(c). The court stated that the amendment would only relate back when the record shows that the requirements of the rule have been met. 662 P.2d at 498. Rule 15(c) states in pertinent part:

> An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment 1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and 2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

COLO. R. CIV. P. 15(c). The *Watson* court stated that in *Marriot*, the Colorado Court of Appeals impliedly held that John Doe pleading did not operate to toll the statute of limitations. *Watson*, 733 F.2d at 1388.

58. *Watson*, 733 F.2d at 1388.

59. *Id. See supra* note 48 and accompanying text.

60. FED. R. CIV. P. 15(c).

new party and a mere misnomer.[61] The court restated its holding in *Archuleta v. Duffy's, Inc.*,[62] that in order for an amendment which substitutes a new party to relate back, the requirements of rule 15(c) must be met:[63] (1) the suit involves the very same transaction or occurrence; (2) the new party had prior notice of action before expiration of the statute of limitations; and (3) the added party knew, or should have known, that but for a mistake in identity he would have been included in the original complaint.[64]

Applying these requirements to the facts, the court found Unipress, Inc. had no knowledge, nor should it have known, of the controversy until several months after the statute ran.[65] The court affirmed the order of the district court dismissing Unipress from the action.[66]

In *Watson*, The Tenth Circuit strictly adhered to the relation back provisions of Rule 15 and refused to accept the softer approach taken by some other courts.[67] This interpretation, however, is the majority position on the issue of John Doe Pleading.[68]

B. *Conversion of Motion to Dismiss into Motion for Summary Judgment*

If a party moving to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12[69] also presents new evidence which is not excluded by the judge, the motion must be treated as a motion for summary judgement under Rule 56.[70] Ordinarily, when a motion to dismiss is treated as a motion for summary judgment, the hearing and notice requirements of Rule 56 must be strictly followed.[71] The Tenth Circuit, however, has long held that a party may waive the hearing and

61. *Watson*, 733 F.2d at 1389.
62. 471 F.2d 33 (10th Cir. 1973).
63. 733 F.2d at 1389.
64. *Id.* at 1390.
65. *Id.*
66. *Id.*
67. *Cf.* Ingram v. Kumar, 585 F.2d 566, 570-71 (2d Cir. 1978), *cert. denied*, 440 U.S. 940 (1979). In *Ingram*, the defendant, as in *Watson*, had no notice of the action prior to the expiration of the statute of limitations. The court nevertheless held the amendment related back pursuant to Rule 15.
68. *See, e.g.*, Royal Indem. Co. v. Petrozzino, 598 F.2d 816, 820 (3d Cir. 1979); Varlack v. SWC Caribbean, Inc., 550 F.2d 171, 174 (3d Cir. 1977); Simmons v. Fenton, 480 F.2d 133, 136 (7th Cir. 1973). *See generally* 3 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE, ¶ 15.15 [4.-2] (2d ed. 1984).
69. FED. R. CIV. P. 12. Subsection (c) of the rule states in pertinent part:
> If on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for Summary Judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

70. Adams v. Campbell County School District, 483 F.2d 1351, 1353 (10th Cir. 1973). FED. R. CIV. P. 12(b)(6) provides in pertinent part:
> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56
> . . . .

71. Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 480 F.2d 607 (10th Cir. 1973). Rule 56(c) provides, in relevant part, that the motion "shall be served at least 10

notice requirements.[72] In *Prospero Associates v. Burroughs Corp.*,[73] the Tenth Circuit decided for the first time that a party waived the notice requirements of Rule 56 as a result of certain pretrial conduct.[74]

In *Prospero*, plaintiffs filed a successful breach of contract action in state court.[75] Thereafter, plaintiff Prospero Associates (Prospero), filed another state court action seeking additional damages.[76] After defendant Burroughs Corporation (Burroughs) removed the action to federal district court, it filed a motion to dismiss on the grounds of *res judicata*, and alternatively moved to dismiss for failure to state a claim.[77] In its motion, Burroughs included evidence of the state court action.[78] The district court treated the motion to dismiss as one for summary judgment and dismissed the complaint on *res judicata* grounds.[79]

On appeal, Prospero argued the district court had converted the motion to dismiss into a motion for summary judgment without the requisite notice.[80] The Tenth Circuit rejected this argument, holding Prospero waived the notice requirements.[81] The Tenth Circuit principally relied on Prospero's pretrial pleadings as the basis for its conclusion.[82]

In its opposition brief to Burroughs' motion to dismiss, Prospero argued that Burroughs failed to affirmatively plead *res judicata*, and if this argument were to "be considered at all, the motion would have to be treated as one for summary judgment."[83] Burroughs responded that it agreed—its motion should be considered as one for summary judgment, and moved the court accordingly.[84] The trial court thereafter granted Burroughs' motion for summary judgment.[85] Based on these events, the court held Prospero waived its right to formal notice.[86]

This holding prompted Judge McKay to file a strong dissent. Although in agreement that there are occasions where a party might waive the requirements of Rule 56, Judge McKay argued that this was not one of them.[87] The dissent recounted the pretrial activities between the parties. Initially Prospero asserted that the motion to dismiss was

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days before the time fixed for the hearing." FED. R. CIV. P. 56(c). *See also Annot.*, 1 A.L.R. FED. 295 (1969 & Supp. 1984).

72. *Id.* at 608.

73. 714 F.2d 1022 (10th Cir. 1983).

74. *Id.*

75. *Id.* at 1023.

76. *Id.*

77. *Id.* at 1023-24.

78. *Id.* Burroughs incorporated by reference the findings of fact, conclusions of law, and judgment in the state court case.

79. *Id.* at 1024.

80. *Id.* Prospero also contested the trial court's summary judgment ruling on the merits. This aspect of the court's opinion will not be reviewed.

81. *Id.* at 1024-25. Under proper circumstances the notice requirements of Rule 56 may be waived. *Mustang*, 480 F.2d at 608.

82. 714 F.2d at 1024-25.

83. *Id.* at 1024.

84. *Id.* at 1024-25.

85. *Id.* at 1025.

86. *Id.* The court also addressed and decided the *res judicata* issue. This aspect of the opinion is not discussed. *See id.* at 1025-28.

87. *Id.* at 1028 (McKay, J., dissenting).

hypothetically improper and it might be a motion for summary judgment. Burroughs mischaracterized Prospero's statement regarding summary judgment and the summary judgment ruling was entered.[88] Judge McKay could not understand why the court sanctioned violations of Rule 56 when its requirements were so easily satisfied.[89]

In past Tenth Circuit cases on this issue,[90] the court has maintained that Rule 56 notice and hearing requirements may be waived by a party. The court has never before indicated what might constitute waiver, but has only conclusorily stated what does not constitute waiver without any discussion of particular facts.[91] In *Prospero*, the Tenth Circuit has for the first time held that a party's actions amount to waiver, but again, the court has failed to articulate the criteria on which it relied. The court seems intent on deciding such waiver of notice issues on a case-by-case basis. Because a party might never know if its action constitutes waiver, it would seem to be in the interest of justice to simply follow Judge McKay's suggestion and demand compliance with Rule 56 notice requirements.

IV. NOTICE PROVISION UNDER THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act of 1938[92] (FLSA) provides employees with a means of redress against employers to recover unpaid wages and penalizes employers found to be in violation of provisions of the FLSA.[93] Specifically, section 216(b) of the FLSA states that a legal action may be maintained by an employee on his own behalf and collectively on behalf of other employees similarly situated.[94] The procedural mechanism of a section 216(b) action creates confusion for the parties, attorneys, and the courts. The Tenth Circuit, in *Dolan v. Project Construction Corp.*,[95] attempted to reduce this confusion by announcing the procedural mechanism which would govern section 216(b) actions.

Dolan involved an employee's suit to recover wages and overtime pay pursuant to sections six and seven of the FLSA.[96] In the district

88. *Id.*

89. *Id.*

90. Dolese v. United States, 541 F.2d 853, 855 (10th Cir. 1976); Adams v. Campbell County School District, 483 F.2d 1351, 1353 (10th Cir. 1973); Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 480 F.2d 607 (10th Cir. 1973).

91. *See* Dolese v. United States, 541 F.2d 853, 855 (rejecting an argument of waiver, noting that objecting party's continuing protests hardly amounted to waiver); Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 480 F.2d 607 (10th Cir. 1973) (holding that the facts presented, which the court did not discuss, did not constitute waiver).

92. 29 U.S.C. §§ 201-262 (1982).

93. 29 U.S.C. § 216 (1982).

94. Section 216(b) provides, *inter alia*: "An action to recover the liability prescribed in [this act] . . . may be maintained . . . by any one or more employees for and in behalf of himself or themselves and others employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which the action is brought." 29 U.S.C. § 216(b) (1982).

95. 725 F.2d 1263 (10th Cir. 1984).

96. *Dolan*, 725 F.2d at 1265.

court,[97] the plaintiffs filed a motion for leave to give notice to other similarly situated employees. This motion was referred to a magistrate, denied by the magistrate, and then subsequently affirmed by the district court. Thereupon the plaintiffs brought this interlocutory appeal to the Tenth Circuit to review the district court order. Essentially, the appeal asked the Tenth Circuit to determine whether either a court or the plaintiffs could provide other similarly situated employees, potential plaintiffs, with notice of the pending lawsuit.[98]

In deciding this issue, the Tenth Circuit initially distinguished a section 216(b) collective action from a class action brought pursuant to Federal Rule of Civil Procedure 23.[99] In a class action, all members of the established class will be bound by the resulting judgment unless a member of the established class specifically "opts-out" of the class.[100] Given the effect of *res judicata*, due process requires that all class members be given notice and the opportunity to opt-out of the class so that their substantive rights will not be adversely affected by a binding judgment resulting from a lawsuit of which they had no knowledge.[101]

A section 216(b) collective action provides that a similarly situated employee must take an affirmative step and "opt-in" to a pending FLSA action in order to be bound by the resulting judgment.[102] Consequently, a potential litigant who does not receive notice and is unaware of a pending action will not have his substantive rights adversely affected by the outcome of that action.[103]

It is the notice aspect, born of the "opt-out/opt-in" distinction between Rule 23 class actions and section 216(b) collective actions which was the focus of *Dolan*.[104] Although section 216(b) provides remedies against spurious collective actions, it is mute with respect to the procedural mechanism by which such actions are brought and the extent, if any, to which a court or a litigant may become involved with providing

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97. *See supra* note 93.

98. Dolan v. Project Construction Corp., 558 F. Supp. 1308 (D. Colo. 1983).

99. 725 F.2d at 1256. FED. R. CIV. P. 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims of defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

100. FED. R. CIV. P. 23(c)(2) provides in pertinent part:

> "The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

Id.

101. *Dolan*, 725 F.2d at 1266.

102. *Id.*

103. *See* Price v. Maryland Casualty Co., 561 F.2d 609 (5th Cir. 1977); LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286 (5th Cir. 1975) (upholding trial court rulings that potential class members in a suit brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, were required to "opt into" the action).

104. *Dolan*, 725 F.2d at 1265.

notification of a pending section 216(b) action to other employees who would be eligible to join therein. The Tenth Circuit Court of Appeals attempted to articulate this procedure in the wake of conflicting decisions by the Second,[105] Seventh,[106] and Ninth Circuits.[107] The Tenth Circuit reached its decision by gleaning what guidance it could from the legislative history.[108]

The Tenth Circuit's holding in *Dolan* allows plaintiffs or counsel to notify other potential plaintiffs of a pending FLSA action but prohibits judicial involvement in either discovery or notification thereof.[109] This holding followed the court's discussion of the history of the FLSA, judicial expansion of the FLSA, and subsequent congressional action to pull in the reins on that judicial expansion.[110]

The court bolstered its rationale, which drew heavily from the legislative history, by contrasting certain section 216(b) aspects with diametrically opposed provisions of a class action suit.[111] The Tenth Circuit concluded that the class action "opt-out" provision encourages litigation and requires active judicial participation to protect substantive rights. Conversely, the section 216(b) "opt-in" provision discourages litigation and relegates the court to passive duties and limited jurisdiction.

The court's holding was also motivated to accommodate Congress's desire not to unduly burden the defendant.[112] In the district court action, plaintiff propounded interrogatories which requested the names of all similarly situated employees and numerous specifics regarding the terms of each employee's employment. The Tenth Circuit noted that allowing such discovery would be a substantial drain on the defendant's time and money.

The Tenth Circuit specifically rejected the Seventh Circuit's interpretation of the same legislative history[113] and, consequently, rejected the Seventh Circuit's holding[114] except that portion which prohibits notice to potential plaintiffs from being sent out on district court letterhead over the signature of the court clerk. This restrictive measure was imposed to prevent a possible misunderstanding by potential plaintiffs

105. Braunstein v. Eastern Photographic Laboratories, Inc., 660 F.2d 335 (2d Cir. 1979) (allowing court sponsored notice).

106. Woods v. New York Life Ins. Co., 686 F.2d 578 (7th Cir. 1981) (holding that plaintiff could communicate with other members of the class under terms and conditions prescribed by the court, but notice should not go out on court letterhead over the signature of a court official).

107. Kinney Shoe Corp. v. Vorhes, 564 F.2d 859 (9th Cir. 1977) (prohibiting notice from plaintiff, counsel, and court).

108. Portal to Portal Act of 1947 § 5, Pub. L. No. 49, 61 Stat. 84. H.R. REP. No. 71, 80th Cong., 1st Sess. 4 (1947); *reprinted in* 1947 U.S. CODE CONG. & AD. NEWS 1032.

109. *Dolan*, 725 F.2d at 1268.

110. *Id.* at 1266-67.

111. *Id.* at 1267.

112. *Id.*

113. *Id.* at 1267 n.3.

114. *Id.* at 1268; *see supra* note 106.

that the judicial imprimatur represented that the suit had merit.[115]

Dolan provides the procedural limitations upon the notice which can be given to similarly situated potential plaintiffs in an FLSA action.[116] Thus, the Tenth Circuit allows parties to notify similarly situated employees, but prohibits judicial involvement with both notification and discovery in accordance with its interpretation that a FLSA section 216(b) collective action is not to breed litigation or unduly burden the defendant employer.[117]

V. GOVERNMENTAL IMMUNITY

A. Joinder of Immune Parties for Discovery of Proportional Fault

In *Hefley v. Textron, Inc.*,[118] the Tenth Circuit considered the possibility of joining immune governmental parties for the purpose of discovery and assessment of proportionate fault. After consideration, the court concluded that no such procedural mechanism exists.[119]

The underlying action resulted from a helicopter crash which injured three members of the Kansas Air National Guard (KANG). The helicopter was manufactured by Textron, owned by the United States, and operated by KANG.[120] The three injured guardsmen brought suit against Textron, whereupon Textron filed a third-party complaint against the United States, Major General Fry (Fry), the State of Kansas, and KANG. Textron sought indemnity, contribution, discovery, and assessment of proportionate fault.[121]

The district court granted the third-party defendants' motion for summary judgment, concluding that the United States and Fry were immune from suit based on the *Feres*[122] and *Stencel*[123] doctrines. The district court determined that it lacked jurisdiction over Textron's claim that it had an implied contract of indemnity with the United States. Provisions of the eleventh amendment were the basis for ruling that Kansas and KANG were immune from suit.[124] Ultimately, the district court

115. *Id.* at 1268. The court also reasoned: "To actively involve the trial court in the sending of notice would necessarily involve engrafting certain additional class action procedures to protect the administration of the case from improper certification and issuance of notice. We refuse to begin this involved process without clear congressional guidance." *Id.*

116. *Id.*

117. It remains to be seen whether this rule announced by the Tenth Circuit will conserve resources, both judicial and the defendant's, or whether subsequent suits brought by those employees who could have been initially joined as plaintiffs will ultimately burden the resources sought to be conserved.

118. 713 F.2d 1487 (10th Cir. 1983).

119. *Id.*

120. *Id.* at 1489.

121. *Id.*

122. Derived from Feres v. United States, 340 U.S. 135 (1950).

123. Derived from Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977).

124. "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

ruled that no procedural mechanism existed which would allow Textron to join the immune entities solely for discovery purposes and assessment of proportionate fault.[125]

Textron's appeal presented the following issues:

1) Can Major General Fry be held liable for his own negligence in performing non-discretionary duties?
2) Can the third-party defendants be kept in the case to determine whether they are liable to Textron under a theory of an implied contract of indemnity?
3) Can the third-part defendants be kept in the case, despite immunity, for purposes of discovery and assessment of proportionate fault under the Kansas comparative negligence statute?[126]

Although Textron presented a battery of possible theories in support of each issue, only those issues which the Tenth Circuit considered noteworthy are addressed here.

B. Immunity of Government Officials

The *Feres* doctrine creates an exception to the United States' liability for "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service,"[127] for which no provisions were made in the Federal Tort Claims Act ("FTCA").[128] This doctrine was extended in *Stencel Aero Engineering Corp. v. United States*.[129] In *Stencel*, the *Feres* doctrine was held to absolve the United States from liability "when a member of the Armed Services brings a tort action against a private defendant and the latter seeks indemnity from the United States under the Tort Claims Act, claiming the Government officials were primarily responsible for the injuries."[130] Further, numerous cases have held that the *Feres* doctrine is applicable to officers and other servicemen in addition to the United States.[131]

In *Hefley*, the Tenth Circuit carefully considered the ramifications of the *Feres* and *Stencil* doctrines, and concluded that the *Feres* doctrine is a separate judicial exception to the FTCA.[132] The Tenth Circuit found Fry was immune from suit despite the fact that his actions may have been ministerial[133] and notwithstanding the express discretionary function exception to the FTCA.[134] The Court stressed that this decision was

125. *Hefley*, 713 F.2d at 1490.
126. *Id.*
127. Feres v. United States, 340 U.S. 135, 146 (1950).
128. Federal Tort Claims Act of 1946, Pub. L. No. 79-601, 60 Stat. 842 (codified as amended in scattered sections of 28 U.S.C.).
129. 431 U.S. 666 (1977).
130. *Id.* at 670.
131. *See, e.g.*, Stanley v. Central Intelligence Agency, 639 F.2d 1146 (5th Cir. 1981); Hass v. United States, 518 F.2d 1138 (4th Cir. 1975); Mattos v. United States, 412 F.2d 793 (9th Cir. 1969); Bailey v. DeQuevedo, 375 F.2d 72 (9th Cir.), *cert. denied*, 389 U.S. 923 (1967).
132. *Hefley*, 713 F.2d at 1492.
133. *Id.*
134. 28 U.S.C. § 2680(a) (1976), in pertinent part provides:

not based upon blind adherence to the *Feres* or *Stencel* doctrines, nor to sovereign immunity in general,[135] but instead was an attempt to promote efficient administration of justice.[136]

C. *Implied Contract of Indemnity*

Despite Textron's contention that there was an implied contract for indemnity, the Tenth Circuit affirmed the trial court's conclusion that it lacked jurisdiction over this claim. This affirmation recognized that the United States waived sovereign immunity for actions based on express or implied contracts.[137] In cases involving actions on express or implied contracts, however, the federal district courts are limited to claims not exceeding $10,000; the Court of Claims has exclusive jurisdiction over claims in excess of $10,000.[138] Because Textron did not limit its claim to $10,000 or less, the district court ruled that it lacked jurisdiction.[139]

After affirming the district court on the issue of jurisdiction, the Tenth Circuit proceeded to extend the *Feres* doctrine. The court stated:

> As an alternative basis for affirming the decision of the trial court, therefore, we hold that where the injured party is a serviceman injured incident to military service, *Feres* and *Stencel* bar a private party from recovering from the United States on a claim of implied contract of indemnity.[140]

As the basis for extending the *Feres* doctrine, the Tenth Circuit discussed the liability of the United States as affected by the situs of the contract, their attempt to avoid circumventing the limitations on liability contained in federal military compensation schemes, and their goal of avoiding a decision which would adversely affect military discipline.[141]

D. *Comparative Negligence and Discovery*

After conceding that the third-party defendants were immune from

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> The provisions of this chapter and section 1346(b) of this title . . . shall not apply to . . . [a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Id.

135. *Hefley*, 713 F.2d 1492.

136. *Id.*

137. 28 U.S.C. § 1346(a)(2) (Supp. II 1978), in pertinent part, provides:

> The district courts shall have original jurisdiction, concurrent with the Court of Claims, of . . . [a]ny other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, . . . or upon any express or implied contract with the United States . . . . For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

Id.

138. *Id.*

139. *Hefley*, 713 F.2d at 1492.

140. *Id.* at 1493.

141. *Id.* at 1492-93.

a suit seeking money damages, Textron argued that the third-party defendants nevertheless could be joined for purposes of discovery and assessment of comparative fault. The Tenth Circuit concluded that the doctrine of sovereign immunity bars the federal courts from exercising jurisdiction over the federal defendants.[142] Regarding the state defendants, the Tenth Circuit relied upon the eleventh amendment to conclude that Textron's claim was barred.[143] Finally, with respect to both federal and state defendants, the Tenth Circuit asserted that there is no procedural mechanism by which to join any of the third-party defendants for purposes of discovery or assessing proportionate fault.[144]

Hefley v. Textron is essentially a case which resolves many issues by application of law to fact. It is notable for the extension of the *Feres* doctrine and the court's assertion that no procedural device exists by which defendants may be joined for the purpose of discovery and assessment of comparative fault. In regard to the joinder issue, the Tenth Circuit relied on the outcome determinative test outlined in *Guaranty Trust Co. v. York*[145] and found:

> to any extent that inclusion of the United States as a party would allow more extensive discovery, which presumably would provide evidence that would persuade the jury to assign a lesser degree of fault to Textron, we conclude that the effect on the outcome of the case would be trivial.[146]

Furthermore, the Tenth Circuit held that the Kansas Tort Claims Act[147] is procedural, not outcome determinative, and is therefore not binding on the federal courts.[148]

VI. TRIAL AND POST-TRIAL MOTIONS

A. *Motion for Directed Verdict*

The Tenth Circuit's decision in *Peterson v. Hager*[149] illustrates the harsh consequence which may result from application of Federal Rule of Civil Procedure 50(a), Motion for a Directed Verdict. Upon denial of a motion for directed verdict made at the close of an adversary's case, a party has two options: first, a party may stand on his original motion and have the denial reviewed on appeal; or second, he may proceed with his case and introduce evidence.[150] By choosing the second option a party waives the right to appeal the denied motion for directed

142. *Id.* at 1495.
143. *Id.* at 1499.
144. *Id.* at 1496, 1499.
145. 326 U.S. 99 (1945).
146. *Hefley*, 713 F.2d at 1497.
147. KAN. STAT. ANN. § 60-258a(c) (1976).
148. *Hefley*, 713 F.2d at 1497.
149. 724 F.2d 851 (10th Cir. 1984).
150. *Id.* at 854, *citing with approval*, 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2531 (1971); 5A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 50.05[1] (2d ed. 1984).

verdict.[151]

In *Peterson*, the plaintiff brought suit for damages for injuries to his pecan trees allegedly caused by defendant's negligent application of an herbicide.[152] To recover damages for injury to crops, Oklahoma law requires evidence of: (1) market value, (2) finishing costs, and (3) transportation costs.[153] The plaintiff, however, only presented evidence of market value, whereupon the defendant moved for a directed verdict on grounds that the plaintiff had failed to present sufficient evidence as to causation and the amount of damages.[154] After his motion was denied, the defendant presented evidence showing plaintiff's reasonable costs for finishing and transportation in an effort to reduce the amount of damages. However, by so doing he provided the essential elements of the plaintiff's case.[155]

At the close of all the evidence, the defendant renewed his motion for directed verdict, which was again denied, and the defendant appealed. Notwithstanding the Tenth Circuit's conviction that the trial court erred in denying the defendant's first motion for directed verdict, the Tenth Circuit affirmed, reiterating what it termed the "well established rule":

> The renewed motion will be judged in the light of the case as it stands at that time. Even though the court may have erred in denying the initial motion, this error is cured if subsequent testimony on behalf of the moving party repairs the defect of his opponent's case.[156]

The Tenth Circuit in *Peterson I*, had originally reversed the district court then, on rehearing, the district court's ruling was affirmed.[157] *Peterson I's* sympathetic tack was apparently based upon a notion of justness. The court recognized the dilemma in which defendant found himself but did not cite the "well established rule" on which it relied on rehearing. Instead, *Peterson I* recognized that the defendant's presentation of evidence remedied the plaintiff's case and viewed this as an action by the defendant to reduce the amount for which he might ultimately be liable. The court in *Peterson I* concluded that the trial court should have directed a verdict for the defendant at the close of the plaintiff's evidence.[158]

This case illustrates that trial courts, on occasion, commit grievous

151. 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2531 (1971); 5A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 50.05[1] (2d ed. 1984).

152. *Peterson*, 724 F.2d at 853.

153. Garrett v. Haworth, 183 Okla. 569, 83 P.2d 822 (1938).

154. *Peterson*, 724 F.2d at 853.

155. Peterson v. Hager, 714 F.2d 1035 (10th Cir. 1983). On the initial hearing of this case, this view was first expressed.

156. *Peterson*, 724 F.2d at 854 (emphasis deleted), (quoting 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2531 (1971)). *Accord* Newman v. Brengle, 250 F.2d 660 (7th Cir. 1958), *cert. denied*, 356 U.S. 951 (1958); Auto Transport v. Potter, 197 F.2d 907 (8th Cir. 1952).

157. Peterson v. Hager, 714 F.2d 1035 (10th Cir. 1983).

158. *Id.*

errors and in the face of such errors, a party has difficult tactical decisions to make. The outcome of this case demonstrates that Rule 50(a) is not always construed so as to "secure the just . . . determination of [the] action," as all rules must be construed.[159]

B. *Motion for Judgment Notwithstanding the Verdict and New Trial*

Federal Rule of Civil Procedure 50(b), Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict, in part, provides:

> A motion for a new trial may be joined with this motion [for judgment notwithstanding the verdict], or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed.

Although this provision has been restrictively interpreted by a large majority of courts, it has been interpreted flexibly by a well-reasoned minority.[160] The majority and minority views are in agreement in recognizing that where a motion for judgment n.o.v. may properly be granted by the trial court, the trial court need not necessarily grant it.[161] Rather, the trial court has the discretion to grant, in the alternative, a new trial if justice dictates.[162] The conflict of opinion arises in the situation where the court determines that the moving party is not entitled to judgment n.o.v. The Tenth Circuit addressed this controversy in *Kain v. Winslow Manufacturing Inc.*[163]

In this case the United States District Court for the District of Kansas *sua sponte* granted the defendant a new trial. Judgment was originally entered in October of 1980, and the defendant filed a timely motion for judgment n.o.v. but did not join therewith a request for a new trial. In November of 1981, some thirteen months after judgment, the trial court ordered the new trial.[164]

The plaintiff's notice appealing the district court's action was specifically addressed to the order of new trial. Upon consideration of this matter, the Tenth Circuit reversed after discussing the controversy surrounding the discretionary provision of rule 50(b). The court concluded by reiterating the fact that the district court was powerless to order a new trial and that the order exceeded its jurisdiction.[165]

When a court determines that the moving party is not entitled to a judgment n.o.v., and the movant has not joined a request for a new trial, the majority view requires that the verdict stand and the court is without jurisdiction to grant a new trial.[166] According to the minority view, a

159. FED. R. CIV. P. 1.
160. *See, e.g.*, Kain v. Winslow Mfg., Inc., 736 F.2d 606, 215 (10th Cir. 1984) (minority).
161. Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 215 (1947) (dictum).
162. *Id.*
163. 736 F.2d 606 (10th Cir. 1984).
164. *Id.*
165. *Id.*
166. *See* Peterman v. Chicago, Rock Island & Pac. R.R., Co., 493 F.2d 88 (8th Cir.), *cert.*

motion for judgment n.o.v. implicitly encompasses a motion for a new trial.[167] Conversely, the majority finds support in the wording of Rule 50(b), the provisions of Rule 59, and policy considerations.[168]

The majority position is that the portion of Rule 50(b) which states that "[a] motion for a new trial may be joined . . . or a new trial may be prayed for in the alternative" is essentially a limitation on the trial court's discretion to grant a new trial.[169] If, as the minority contends, a motion for judgment n.o.v. encompasses a motion for a new trial, then the above quoted language of Rule 50(b) would be superfluous.[170] In *Jackson v. Wilson Trucking Corp.*[171] the court noted that the purpose of Rule 59, sections (b) and (d), which provides for new trials,[172] would be largely nullified by the minority interpretation.[173]

The policy considerations behind Rule 59, expressed in *Kanatser v. Chrysler Corp.*,[174] and cited with approval in *Kain*,[175] were found to be equally appropriate considerations for limiting a court's jurisdiction with regard to a Rule 50(b) grant of a new trial.[176] According to the *Kanatser* court:

> There is good reason for thus confining the trial court within the narrow limits of its discretionary powers, for it is important in the administration of justice that there shall be an end to litigation, and that issues tried and decided by a jury shall not be lightly set aside. If a case is to be retried, it should be done with dispatch, lest the error of delay outweigh the error of trial.[177]

As previously noted, the minority of jurisdictions allow the district court to exercise its discretion and order a new trial in the situation where the motion for judgment n.o.v. must be denied. Support for this

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denied, 417 U.S. 947 (1974); Jackson v. Wilson Trucking Corp., 243 F.2d 212, 215 (D.C. Cir. 1957). However, a trial court which acts "no later than 10 days after entry of judgment . . . may order a new trial for any reason for which it might have granted a new trial on motion of a party." FED. R. CIV. P. 59(d).

167. *See* Jackson v. Wilson Trucking Corp., 243 F.2d 212, 217 (D.C. Cir. 1957) (Burger, J., dissenting); 5A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 50.11 (2d ed. 1984).

168. FED. R. CIV. P. 50(b), see *supra* text preceeding note 160; FED. R. CIV. P. 59:

> (a) A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tied without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

FED. R. CIV. P. 59(a).

169. *Jackson*, 243 F.2d at 216-17.

170. *Id.*

171. 243 F.2d 212 (D.C. Cir. 1957).

172. These subsections provide a strict 10 day period in which a litigant or the court, respectively, may motion or order a new trial. FED. R. CIV. P. 59(b), (d).

173. *Jackson*, 243 F.2d at 216.

174. 199 F.2d 610 (10th Cir. 1952), *cert. denied*, 344 U.S. 921 (1953).

175. 736 F.2d at 608.

176. *Id.*

177. *Kanatser*, 199 F.2d at 615.

view is embodied in Judge (now Chief Justice) Burger's dissenting opinion in *Jackson v. Wilson Trucking Corp.*[178] Judge Burger characterized the majority position as an artificial limitation upon a court's choice of remedies which is contrary to the liberal spirit of the Federal Rules of Civil Procedure.[179] He reads the language of Rule 50(b), stating that a party may join a motion for a new trial with a motion for judgment n.o.v., as a "signpost" offering guidance rather than as a limitation.[180] More recently, a noted commentator[181] offered the pragmatic view that where a motion for judgment n.o.v. has been made, the adversary is on adequate notice of the challenge to the sufficiency of evidence. Accordingly, it would not be improper to deem a motion for new trial, on the ground that the verdict was contrary to the great weight of evidence, to be included within a motion for judgment n.o.v.[182]

VII. FINAL JUDGMENT RULE

A. *Subpoena Orders and the* Perlman *Exception*

As prescribed by statute, United States circuit courts may only hear appeals from final decisions of federal district courts.[183] An order to appear before a grand jury pursuant to a subpoena *duces tecum* is an interlocutory order and consequently not appealable by the witness.[184] In the case of *In re Grand Jury Proceedings, Vargas*,[185] the Tenth Circuit addressed the application of an established exception to this rule to allow appeal from a trial court's order directing a witness to produce documents.

In *Vargas*, an attorney received a subpoena *duces tecum* directing him to appear and deliver client billing records for a community health center and another nonprofit corporation.[186] After complying with the subpoena, the attorney received another subpoena directing him to pro-

178. *Jackson*, 243 F.2d at 217 (Burger, J., dissenting); *See also* 5A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 50.11 (2nd ed. 1982); Note, *Federal Court Procedure: Rule of Civil Procedure 50(b): Authority of Trial Court to Grant New Trial on Motion for Judgment Notwithstanding the Verdict*, 5 UCLA L. REV. 154 (1958).

179. FED. R. CIV. P. 1 provides that the Federal Rules of Civil Procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action." *Id.*

180. *Jackson*, 243 F.2d at 222 (Burger, J., dissenting).

181. James W. Moore, author of MOORE'S FEDERAL PRACTICE.

182. 5A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 50.11 (2d ed. 1982).

183. 28 U.S.C. § 1291 (1982). This statute embodies the policy against piecemeal litigation. *See* Catlin v. United States, 324 U.S. 229, 233-34 (1945) (dictum) (the policy against appeals other than from final decisions conserves judicial energy and prevents delays caused by interlocutory appeals).

184. United States v. Ryan, 402 U.S. 530, 532-33 (1972) (subpoena *duces tecum* requiring production before federal grand jury of records of respondent's overseas business not appealable); Cobbledick v. United States, 309 U.S. 323, 327-28 (1940) (just as important to prevent delay of grand jury proceedings as of trial, thus no appeal proper from subpoena *duces tecum*); cf. Alexander v. United States, 201 U.S. 117, 121-22 (1966) (subpoena *duces tecum* requiring production of records before a special examiner not appealable). 28 U.S.C. § 1292 (1982) lists interlocutory orders from which appeals may be taken.

185. 723 F.2d 1461 (10th Cir. 1983), *cert. denied*, 105 S. Ct. 90 (1984).

186. *Id.* at 1463.

duce client files to substantiate the billings.[187] The attorney appeared but refused to produce the records, claiming a fifth amendment privilege regarding the records.[188] The presiding judge ordered the attorney to produce the records and informed the attorney contempt proceedings would result if he refused.[189] The community health center filed an appeal and received a stay of the order.[190] The attorney later filed a Petition for a Writ of Mandamus and, or in the alternative, a Writ of Prohibition.[191]

In an opinion written by Judge McKay, the Tenth Circuit considered the health center's argument that although an order to appear at a hearing pursuant to a subpoena *duces tecum* is ordinarily not appealable, this case fell within the purview of the exception established in *Perlman v. United States*.[192] The court noted that *Perlman* involved a situation where a witness objected to release by the Clerk of the Court of constitutionally privileged documents to adverse parties. In *Perlman*, the Supreme Court reasoned that the witness was unable to resist the order himself and suffer contempt, and the clerk could hardly be expected to risk contempt to protect the witness. Based on these facts, the Supreme Court allowed the appeal, holding that if it ruled otherwise, Perlman would be "powerless to avert the mischief of the order."[193]

Within circuit courts, one faction, led by the Second Circuit,[194] interprets the *Perlman* exception narrowly, "emphasizing the policies behind the final judgment rule and the nature of the relationship between the party subpoenaed and the party possessing the privilege."[195] Cases from these circuits subscribe to the rationale that where an individual objects to a subpoena *duces tecum* issued to a third party custodian of the documents, the nature of the relationship between the third party and witness should be considered.[196] Where the witness might be expected to risk a contempt citation to protect the third party's privilege or inter-

187. *Id.* At issue in the investigation were charges of a scheme to use public money for private gain.

188. *Id.* In a previously filed motion to quash the attorney asserted attorney-client and work product privileges. *Id.*

189. *Id.* at 1464.

190. *Id.*

191. *Id.*

192. 247 U.S. 7 (1918).

193. *Id.* at 13.

194. *See, e.g.*, National Super Spuds, Inc. v. New York Mercantile Exch., 591 F.2d 174 (2d Cir. 1979) and cases cited therein.

195. *Vargas*, 723 F.2d at 1465.

196. *See, e.g., In re* Sealed case, 655 F.2d 1298, 1301 (D.C. Cir. 1981) (corporation may not appeal denial of a motion to quash subpoena *duces tecum* requiring production by the corporation's outside counsel of work product materials); *In re* Obe-Koetter, 612 F.2d 15, 18 (1st Cir. 1980) (client may not immediately appeal order directing attorney to testify before grand jury); National Super Spuds, Inc. v. New York Mercantile Exch., 591 F.2d 174, 177-79 (2d Cir. 1979) (government agency may not appeal, prior to contempt citation, order directing employees to answer questions of defendant in private class action). *See generally* 9 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 110.13[2] (2d ed. 1984) (discussing appealability prior to contempt citation, of orders requiring non-party disclosure of information).

est, appeal will not lie.[197]

The other view interprets the *Perlman* exception broadly. Whenever the subpoena is issued to the custodian of a third party's documents, the third party may immediately appeal the denial of a motion to quash. An immediate appeal is justified because the appellant himself cannot disobey the order and appeal after being found in contempt.[198]

In *Vargas*, the Tenth Circuit adopted the narrow view.[199] The court held that the third party is entitled to immediate appeal only when to deny the appeal would eliminate any review whatsoever of his claim.[200] The court reasoned that an attorney might ordinarily be expected to expose himself to contempt to protect the client's interest and demonstrate his tenacity as an advocate.[201] Additionally, if the attorney asserts a work-product privilege along with the attorney-client privilege, as in Vargas, the attorney would be motivated to risk contempt to protect his own interests.[202] The court concluded that the health center would have to wait for a contempt citation to be issued against its attorney, or show the attorney would produce the records when threatened with contempt, in order to appeal.[203]

As an alternate to appeal from a contempt citation, the court suggested that application for a Writ of Mandamus could be used where there has been a clear abuse of discretion by the trial judge.[204] Considering the attorney's petition for Writ of Mandamus, or in the alternative, Prohibition, the court found no abuse of discretion on the part of the trial judge and denied the petition.

Although in *Vargas* the court has clearly articulated its stance on the *Perlman* exception to the nonappealability of subpoena *duces tecum* orders, the court's opinion is strangely quiet about its previous holdings in this area. The court failed to mention its 1965 case of *Covey Oil Co. v. Continental Oil Co.*,[205] wherein it held that non-party witnesses served with subpoenaes *duces tecum* "should not be required to expose themselves to the hazard of punishment in order to obtain a determination of

197. See *supra* note 196.

198. *See, e.g., In re* Berkley & Co. Inc., 629 F.2d 548, 551-52 (8th Cir. 1980) (corporation permitted to appeal district court's order to government which had custody of corporation's documents, to disclose documents); *In re* Matter of Grand Jury Applicants, C. Schmidt & Sons, Inc., 619 F.2d 1022, 1024-26 (3d Cir. 1980) (corporation permitted to appeal denial of motion to quash subpoenas directed to its employees); *In re* Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 673-74 (D.C. Cir.), *cert. denied*, 444 U.S. 915 (1979) (corporation permitted to appeal denial of motion to return records held by government, as to which records the corporation's employee had been ordered to testify); Velsicol Chemical Corp. v. Parsons, 561 F.2d 671, 673-74 (7th Cir. 1977), *cert. denied*, 435 U.S. 942 (1978) (corporation permitted to appeal denial of a motion to quash subpoenas requiring attorney from corporation's outside counsel to testify and produce documents relating to representation of the corporation).

199. See *supra* note 196.

200. *Vargas*, 723 F.2d at 1465.

201. *Id.* at 1465-66.

202. *Id.* at 1466.

203. *Id.*

204. *Id.* at 1467.

205. 340 F.2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965).

their claimed rights."[206] The court in *Covey* made this statement in response to Continental's argument that the subpoenaed witnesses should obtain review by disobeying the order and then appeal from a resultant adjudication of contempt, instead of direct appeal.[207]

Although the Tenth Circuit might have distinguished *Covey* on the basis that *Vargas* involved a *party* witness,[208] several courts have applied the non-appealability rules to non-party, as well as party witnesses.[209] Additionally, in the Tenth Circuit case of *Sanders v. Great Western Sugar Co.*,[210] non-party local officials of the Small Business Administration were allowed to appeal an order requiring them to respond to a subpoena *duces tecum* on the authority of *Covey*.[211] The officials in that case claimed a governmental privilege of nondisclosure.[212] *Sanders* is remarkably similar to *Branch v. Phillips Petroleum*,[213] a case quoted in *Vargas* and expressly disapproved.[214]

In *Vargas*, the court should have delineated the scope of *Covey* before adopting what appears to be a totally contrary view. If the court perceived *Covey* to be distinguishable, it should have said so; if not, the case should have been overruled. The *Vargas* court's failure to address these previous inconsistent decisions[215] has considerably muddied the clear policy and rule of law laid down in *Vargas*.

B. *Orders Involving Injunctions*

One statutory exception to the Final Judgment Rule[216] allows appeals of right from district court orders "granting, continuing, modifying, refusing, or dissolving injunctions."[217] The issue of whether

206. *Id.* at 996-97.
207. *Id.* at 996.
208. *See* American Express Warehousing Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 282 (2d Cir. 1967) (dictum) (*Covey* distinguished where allowing appeal was justifiable because the appellant was not a party, and therefore, could not obtain review on appeal from a judgment in the main action).
209. *See* Gialde v. Time, Inc., 480 F.2d 1295, 1298-1301 (8th Cir. 1973) (no appeal permitted of discovery order directing non-party employee of defendant to disclose source of his information); United States v. Anderson, 464 F.2d 1390, 1392 (D.C. Cir. 1972) (no appeal permitted of discovery order directing non-party witnesses to answer deposition questions); United States v. Fried, 386 F.2d 691, 694 (2d Cir. 1967) (no appeal permitted of denial of a motion to quash information subpoena served on non-party witness who was defendant's son). *See also* National Super Spuds v. New York Mercantile Exch., 591 F.2d 174, 176-81 (2d Cir. 1979) (no appeal permitted of order directing non-party government employee to respond to deposition questions).
210. 396 F.2d 794 (10th Cir. 1968).
211. *Id.* at 794.
212. *Id.* at 794-95.
213. 638 F.2d 873 (5th Cir. 1981).
214. *Vargas*, 723 F.2d at 1465.
215. *Compare* Centurion Inds., Inc. v. Warren Steurer & Assoc., 665 F.2d 323, 324 n.1 (10th Cir. 1981) (appeal permitted from order requiring non-party witness to disclose trade secrets) *with* United States v. Feeney, 641 F.2d 821, 823-25 (10th Cir. 1981) (no appeal permitted from denial of party intervenor's motion to quash subpoena *duces tecum* requiring production of documents in connection with post-conviction proceedings).
216. "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ." 28 U.S.C. § 1291 (1982).
217. 28 U.S.C. § 1292(a)(1) (1982).

dismissal of a party seeking injunctive relief qualifies that party to appeal under the statutory exception arose in *B. F. Goodrich Co. v. Grand River Dam Authority*.[218]

In *Goodrich*, B. F. Goodrich Company sued Grand River Dam Authority (Grand River) in United States District Court for the Northern District of Oklahoma alleging 4 causes of action, the most significant of which sought reformation of a settlement agreement between Grand River and Goodrich.[219] Grand River, in turn, filed a third-party complaint against Northeast Oklahoma Cooperative (Northeast) requesting declaratory judgment. Northeast responded with a counterclaim seeking injunctive relief.[220] The District Court dismissed Northeast, the third party defendant, on its own motion after determining no justiciable controversy existed between Northeast and defendant Grand River.[221] Northeast subsequently appealed the dismissal.

In considering whether Northeast might properly maintain its appeal, the Court of Appeals quickly dismissed the contention that the district court's order was a final judgment. The court noted that resolution of at least three claims in the main suit between Goodrich and Grand River still remained.[222] The court then summarily rejected Northeast's final argument that since its counterclaim prayed for injunctive relief, the order dismissing the counterclaim was tantamount to denial of an injunction and therefore appealable.[223] The court stated it could not subscribe to such a strained interpretation of the statute—the district court had not denied the injunction on the merits, but had simply dismissed Northeast from the entire proceeding.[224] The court dismissed the appeal.[225]

In Judge Holloway's dissent, he argued that dismissal of Northeast's counterclaim had the "effect" of refusing an injunction and Northeast was therefore entitled to appeal.[226] Based on *Carson v. American Brands, Inc.*,[227] the dissent would allow an appeal where, as here, the party showed both that the order had the practical effect of denying an injunction and that the order had serious or irreparable consequences which could only be effectively challenged through immediate appeal.[228]

In *Carson*, the parties negotiated a settlement permanently enjoining defendant employers from discriminating against black employees.[229] The district court refused to enter a consent decree to this

218. 712 F.2d 453 (10th Cir. 1983).
219. *Id.* at 454.
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.* at 455. Northeast claimed the Court of Appeals had jurisdiction to hear the appeal based on 28 U.S.C. § 1292(a)(1) (1982). (*see supra* note 217 and accompanying text).
224. *Id.* at 455.
225. *Id.*
226. *Id.* (Holloway, J., dissenting).
227. 450 U.S. 79 (1981).
228. *Goodrich*, 712 F.2d at 455.
229. *Carson*, 450 U.S. at 81 (respondent employers and unions agreed to give hiring

effect.[230] The Court of Appeals for the Fourth Circuit dismissed the appeal saying the court's refusal did not amount to denial of injunction[231] under section 1292.[232] The Supreme Court reversed, stating that although the district court's refusal to enter the consent decree did not technically deny an injunction, it nevertheless had the "practical effect of doing so."[233] The Court held that in order for appeal to lie, the party must show not only that the order had the practical effect of refusing an injunction, but that "an interlocutory order of the court might have a 'serious, perhaps irreparable, consequence,' and that the order can be 'effectually challenged' only by immediate appeal . . . ."[234]

Judge Holloway would have held that Northeast met this burden.[235] Although there is some support for the Tenth Circuit's holding in *Goodrich*,[236] perhaps the court should have considered Northeast's argument more closely.

VIII. CROSS-APPEALS

Savage v. Cache Valley Dairy Assoc.[237] takes up the issue of whether filing a cross-appeal within the fourteen-day period, provided by Federal Rules of Appellate Procedure 4(a)(3),[238] is a jurisdictional prerequisite for the appellate court. In *Savage*, the plaintiff-appellant filed a timely notice of appeal. The two defendant-cross-appellants filed their cross-appeals one day and five days late, respectively.

The Tenth Circuit's consideration of this issue notes that several of the circuits are in disagreement as to whether timely filing of a cross-appeal is or is not jurisdictional. Both the Seventh Circuit[239] and the Sixth Circuit[240] hold that the timely filing of a cross-appeal is a jurisdictional prerequisite. Conversely, the Ninth Circuit[241] and Third Circuit[242] hold that the cross-appeal rule is not a jurisdictional mandate.

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and seniority preferences to black employees and to fill one-third of certain supervisory positions with qualified blacks).

230. *Id.*

231. *Id.* at 82.

232. 28 U.S.C. § 1292(a)(1) (1982).

233. *Carson*, 450 U.S. at 83-84.

234. *Id.* at 84 (quoting Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955)).

235. *Goodrich*, 712 F.2d at 456.

236. *See, e.g.*, Shirey v. Bensalem Township, 663 F.2d 472, 475-78 (3d Cir. 1981) (dismissal of plaintiffs' prayer for injunctive relief not appealable because plaintiffs neither sought a preliminary injunction, nor alleged continuing harm, and because the district court dismissed plaintiffs' complaint for reasons unrelated to plaintiffs' entitlement to injunctive relief).

237. 737 F.2d 887 (10th Cir. 1984).

238. In pertinent part, the rule provides: "If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed . . . ." FED. R. APP. P. 4(a)(3).

239. Martin v. Hamil, 608 F.2d 725, 731 (7th Cir. 1979).

240. Richland Knox Mutual Ins. Co. v. Kallen, 376 F.2d 360, 364 (6th Cir. 1967).

241. Bryant v. Technical Research Co., 654 F.2d 1337, 1341 (9th Cir. 1981).

242. Scott v. University of Delaware, 601 F.2d 76, 83 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979).

Previously, in two unpublished opinions,[243] the Tenth Circuit has held that the filing of a timely cross-appeal is both mandatory and jurisdictional. In *Savage*, the Tenth Circuit ruled that the unpublished decisions are binding precedent. Accordingly, in the Tenth Circuit, compliance with the provision of Federal Rule of Appellate Procedure 4(a)(3) is a jurisdictional prerequisite to the circuit court's jurisdiction.[244]

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243. Herndon v. Piper Aircraft Corp., No. 81-1916 (10th Cir. October 5, 1981); Jenkins v. Peet, No. 82-1705 (10th Cir. July 29, 1982).
244. *Savage*, 737 F.2d at 889.